IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~000~~ 70-34

SIERRA CLUB, a California corporation,

Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Respondents.

Brief Amicus Curiae of the County of Tulare in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATEMENT OF FACTS

Mineral King is a valley in the Sierra Nevada Mountains of California, east of Visalia and bounded on three sides by the Sequoia National Park. During the last century it was a silver and gold mining center. In the early 1900's small hydroelectric facilities which are still in use were built at Mineral King, and for several decades it has been the summer retreat for many cabin owners.

Nearly all of the land at Mineral King is owned by the United States and is managed by the United States Forest Service as part of the Sequoia National Forest. For over twenty years Mineral King with its unique topography has been recognized as a potential site for one of the world's finest winter sports and ski areas. In 1965 the Forest Service solicited proposals for the construction and operation of public recreational facilities at Mineral King. The proposal of Walt Disney Productions was chosen from six submitted and Disney was granted a preliminary permit for the preparation of a master plan for the Mineral King recreational area. Disney committed $35 million to the development, the State of California proposes to spend $22 million for the improvement of the access road, and the Federal Economic Development Administration committed $3 million of economic development funds to construction of the access road.

In June, 1969, nearly four years after the Forest Service announced its solicitation of proposals, the Sierra Club brought an injunctive action, alleging several supposed deficiencies in the authority of the Secretaries of the Interior and Agriculture to permit a recreational area to be developed at Mineral King.

On interlocutory review of the preliminary injunction granted by the District Court, the Ninth Circuit first held that the Sierra Club lacked standing to maintain the action. It then proceeded to hold unanimously that the granting of the preliminary injunction had been an abuse of discretion, because there was little or no likelihood the Sierra Club could prevail on the merits in its technical assertions that the defendants were threatening to exceed the authority delegated to them by Congress.

The relevant portions of the statutes involved are set out in the Petition for Certiorari, Appendix C.

INTEREST OF THE AMICUS CURIAE

This brief of an *amicus curiae* is filed pursuant to Rule 42 of the Rules of the Supreme Court. Consent to the filing of this brief is not required, since it is filed by the County of Tulare, a political subdivision of the State of California, and is sponsored by the authorized law officer thereof, Calvin E. Baldwin, County Counsel.

The County of Tulare, the county in which Mineral King is located, has cooperated with federal and state authorities over several years in planning for the Mineral King recreational development. Land use planning is a critical concern of the County since approximately one-half of the land within its boundaries is in federal ownership and thus exempt from property tax. The County has encouraged the conservation of private agricultural lands under the California Land Conservation Act of 1965 at an enormous sacrifice in erosion of its property tax base. Tulare County is already an economically depressed area with high unemployment and a tax base too small to meet its growing requirements for public services. Only through completion of the Mineral King recreational area can the County correct its present depressed economic condition and absorb the tax revenue losses associated with its land conservation program.

SUMMARY OF ARGUMENT

I

Petitioner sought a preliminary and permanent injunction in the District Court alleging that the Secretaries of Agriculture and the Interior threaten to exceed the land management authority delegated to them by Congress. The District Court granted a preliminary injunction. On interlocutory appeal, the Ninth Circuit Court of Appeals

reversed on two grounds: it held that petitioner lacked standing to maintain the action; and it unanimously held that the District Court abused its discretion in granting a preliminary injunction because petitioner had failed to show a strong likelihood it would prevail on the merits. The Court of Appeals analyzed each of the contemplated acts which are alleged to exceed the statutory authority of the cabinet officers and concluded there was little or no likelihood that petitioner would prevail on any one of its assertions.

When a plaintiff seeks to enjoin administrative action and the public interest would be adversely affected by the decree, the plaintiff is required, as a condition to the granting of a preliminary injunction, to make a "strong showing that it is likely to prevail on the merits." Petitioner asserts that this standard is too high and erroneously argues that it need merely show that it has raised "serious, substantial, difficult and doubtful questions going to the merits." Even if petitioner's suggested standard were appropriate the granting of the preliminary injunction was an abuse of discretion, because there is little or no likelihood the petitioner can prevail on the merits.

This Court should not grant certiorari to consider a standing question when the Ninth Circuit has disposed of the case on independent grounds going to the merits.

II

The Ninth Circuit Court of Appeals held that petitioner lacked standing to bring this action and in doing so properly decided this case under *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970) and *Barlow v. Collins,* 397 U.S. 159 (1970). *Data Processing* holds that a plaintiff must meet two necessary conditions

to have "standing to sue": the administrative action which the plaintiff challenges must have caused or threatened to cause plaintiff "injury in fact"; and this injury must be to an interest of the plaintiff which is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." Petitioner cannot satisfy these two tests. There is no injury in fact threatened to the Sierra Club by the proposed recreational use of federally-owned land in Mineral King, and none of the land management statutes cited by petitioner was enacted with a view to protecting the petitioner's bias for minimal recreational use of federal lands.

ARGUMENT

I

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THERE IS LITTLE OR NO LIKELIHOOD THAT THE PETITIONER CAN PREVAIL ON THE MERITS.

A. This Court Should Not Grant Certiorari to Consider a Standing Question in a Case Which Has Been Properly Disposed of on Alternative and Independent Grounds.

The Ninth Circuit decided that the Sierra Club lacked standing to maintain this action. However, the Ninth Circuit, going far beyond the threshold question of standing, looked to the merits of the lower court's decision, and unanimously held it was an abuse of discretion for the District Court to grant a preliminary injunction.

The Court of Appeals carefully analyzed each of the petitioner's substantive contentions and concluded that there is little or no likelihood the petitioner can succeed on the merits. It therefore vacated the order granting the preliminary injunction and remanded the case to the District Court. Since that part of the opinion below which concerns the merits is entirely independent of the discussion of standing, full scale review of the standing

issue by this Court will not affect the disposition of the case. The only foreseeable result of a reversal of the Ninth Circuit's decision as to standing would be, after remand to the trial court, a dismissal of the complaint on a motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure rather than dismissal on a motion pursuant to Rule 12(b)(6).

This Court is already subject to inordinate demands on its time and attention and should grant certiorari only when special and important reasons for doing so are shown. In a case such as this, in which the merits have been correctly resolved on grounds independent of a challenged procedural ruling, certiorari is properly denied. *The Monrosa v. Carbon Black, Inc.*, 359 U. S. 180 (1959). In *The Monrosa* this Court dismissed a writ of certiorari as improvidently granted, observing,

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. 359 U.S. at p. 184.

B. The District Court Abused Its Discretion in Granting a Preliminary Injunction Because There Is No Strong Likelihood or Reasonable Certainty That the Petitioner Will Prevail on the Merits.

Petitioner contends that the Ninth Circuit applied an incorrect standard in determining that the District Court abused its discretion in issuing the preliminary injunction. The Ninth Circuit said that in order to obtain a preliminary injunction, "particularly against the discretionary action of an official of cabinet rank, the plaintiff must establish a strong likelihood or 'reasonable certainty' that he will prevail on the merits at a final hearing." Petition, App. A at 17. Petitioner claims that this standard is in conflict with the decisions of other circuits.

On the contrary, the circuit courts agree that when a plaintiff seeks to enjoin federal administrative action, it must make a "strong showing that it is likely to prevail on the merits." *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *accord, A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969) ("substantial likelihood of success"); *North Atlantic Westbound Freight Association v. Federal Maritime Comm'n.*, 397 F.2d 683, 684-85 (D.C. Cir. 1968) ("strong showing that it is likely to prevail"); *Belcher v. Birmingham Trust Nat'l. Bank*, 395 F.2d 685, 686 (5th Cir. 1968) ("substantial showing of probable success"); *Baggett Transp. Company v. Hughes Transp., Inc.*, 393 F.2d 710, 716-17 (8th Cir. 1968) ("strong showing that it is likely to prevail"); *Airport Comm'n of Forsyth County v. CAB*, 296 F.2d 95, 96 (4th Cir. 1961) ("strong showing that it is likely to prevail"). In the *Quaker Action Group* case, *supra*, Chief Judge Bazelon for the District of Columbia Circuit said:

> The standards which should guide the decision to grant a preliminary injunction have been often stated. The movant must show a *substantial likelihood* of success on the merits, and that irreparable harm would flow from the denial of an injunction. In addition, the trial judge must consider the inconvenience that an injunction would cause the opposing party, *and must weigh the public interest as well.* 421 F.2d at 1116 (Emphasis added, footnote omitted).

A "substantial likelihood" of success on the merits (or a "strong likelihood" as the Ninth Circuit required in the present case (Petition, App. A. at 17)) should be a prerequisite to the imposition of a preliminary injunction where the plaintiff seeks to enjoin action by members of the President's cabinet on a subject which is within the Enumerated Powers of Congress (Article IV, Section 3,

Clause 2 of the Constitution) and which the Congress has expressly delegated to the executive branch.[1]

A "substantial likelihood" of success on the merits should also be required where the public and non-parties will be adversely affected by the preliminary injunction, and the District Court erred in refusing to consider the interests of the public and non-parties before issuing a preliminary injunction. This Court has ruled in connection with the issuance of a preliminary injunction that "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." (Footnote omitted) *Inland Steel Company v. United States,* 306 U.S. 153, 157; 83 L.Ed. 557, 560 (1939). Learned Hand applied this principle in 1919 as a District Judge in *Dryfoos v. Edwards,* 284 Fed. 596, 603 (S.D.N.Y. 1919), and more recently Justice Harlan did so sitting individually as Circuit Justice. *Breswick & Company v. United States,* 100 L.Ed. 1510, 1514 (1955).

The principle that the public interest must be considered in deciding whether to issue a preliminary injunction is particularly apt where the plaintiff seeks to enjoin federal administrative action. *Virginia Petroleum Jobbers Ass'n. v. FPC, supra.*

The Court in *Virginia Petroleum* said:

> . . . [W]e must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a *serious adverse effect on other interested persons.* Relief saving one claimant from irreparable injury, at

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1. Acts of August 25, 1916, March 4, 1911, April 9, 1924, and February 15, 1901, 16 U.S.C. §§ 1, 5, 8, 79 (Secretary of the Interior); Acts of March 4, 1915, June 4, 1897, and July 3, 1926, 16 U.S.C. §§ 497, 551, 688; Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (Secretary of Agriculture).

the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents. 259 F.2d at 925 (Emphasis added).

The issuance of a preliminary injunction in this case has had "a serious adverse effect on other interested persons", namely, the residents of Tulare County, the citizens of the State of California, the users of recreational facilities in the United States in general and Walt Disney Productions.

The County of Tulare is a large, predominantly rural county located in central California with a total area of approximately 3,100,000 acres. Of this amount, 1,750,000 acres are forested land; the vast majority of the balance is farmland.

Tulare is not a rich county. On the contrary, it is an economically depressed region with high unemployment and a tax base inadequate to support the increasing demand for public services. Tulare County has been declared a redevelopment area under Title I of the Public Works and Economic Development Act of 1965, 42 U.S.C. §§ 3121-3226, because of its high unemployment.

Tulare County has encouraged the preservation of its agricultural lands under the California Land Conservation Act of 1965, Calif. Government Code, §§ 51200-51295, West Ed. 1966. Under the terms of this Act, land committed to continued agricultural use is assessed at its value based on that use, rather than on its potential developmental value. Within the next two years most of the privately owned land outside urban areas in the county will have been preserved from conversion to urban or suburban use, but at a substantial cost to the county in the form of a reduced tax base.

Losses associated with the County's land conservation program and lagging economy must be recouped elsewhere.

Recognizing this fact, the County has been involved for several years in planning for the Mineral King recreational area. When completed, the complex will generate an estimated $1.5 million annually in tax revenues for the County. The potential beneficial effects of the recreational area on the region's economy induced the Federal Economic Development Administration to contribute $3 million toward construction of the Mineral King access road.

Delay in commencement of the project will preclude early allocation of the tax revenues to finance needed social services. Spiraling construction costs and delay could also combine to jeopardize the commitments of the State of California and the developer to spend $60 million for the access road and recreational facilities. The losses associated with further delay can never be recovered but are wholly avoidable if this litigation is resolved expeditiously.

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes. . . . We must determine . . . how the Court's action serves the public best. *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d at 925.

In issuing the preliminary injunction which the Ninth Circuit ruled was an abuse of discretion, the District Court completely disregarded the public interest and the harm which its decree would inflict on non-parties. It enjoined as unlawful the issuance of the same type of permits previously issued for Aspen, Vail, Heavenly Valley, Jackson Hole and 80 other ski areas throughout the West, remarking merely:

> It is beside the point to argue, as do defendants, that a preliminary injunction in this case would interfere

with progress by raising doubts about the validity of similar arrangements made with respect to 84 other recreation areas, including 5 in California. This Court is not concerned with the controversy between so-called progressives and so-called conservationists. Record at 315.

This Court and most, if not all, of the circuits have endorsed and applied the principles set forth in *Virginia Petroleum,* that the plaintiff must show a substantial likelihood of success on the merits before an injunction which will adversely affect the public will be issued. *Permian Basin Area Rate Cases,* 390 U.S. 747, 773-74 (1968); *Belcher v. Birmingham Trust Nat'l Bank, supra; Baggett Transp. Co. v. Hughes Transp., Inc., supra; Nelson v. Miller,* 373 F.2d 474, 477-78 (3rd Cir. 1967); *Hamlin Testing Lab., Inc. v. AEC,* 337 F.2d 221, 222 (6th Cir. 1964); *Airport Comm'n. of Forsyth County v. CAB,* 296 F.2d 95-6 (4th Cir. 1961); *Associated Securities Corp. v. SEC,* 283 F. 2d 773, 775 (10th Cir. 1960); *Eastern Air Lines v. CAB,* 261 F.2d 830 (2d Cir. 1958). The district courts have had no difficulty in applying those principles, even where they have involved the district judge in the delicate balancing of public interest against private interests. *See, e.g. Erie-Lackawanna Railroad Company v. United States,* 259 F. Supp. 964, 972-73 (S.D.N.Y. 1966); *United States v. Mills,* 187 F. Supp. 314, 320 (D. Md. 1960).

Under this standard, the issuance of a preliminary injunction in this case was an abuse of discretion.

C. The District Court Abused Its Discretion in Granting a Preliminary Injunction Because Petitioner Has Not Even Raised "Serious, Substantial, Difficult or Doubtful Questions Going to the Merits."

Petitioner asserts that the Ninth Circuit applied too high a standard in requiring a strong likelihood of success

on the merits as a prerequisite to granting a preliminary injunction. According to petitioner, a plaintiff need only raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation" if the other requirements for preliminary relief are met. Petition at 19. However, petitioner has not even satisfied its own test since no serious, substantial, difficult and doubtful questions going to the merits have been raised.

The proposed acts of executive officers are, as a matter of law, within the scope of authority delegated to the executive branch by Congress. Article IV, Section 3, Clause 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." This Congressional power has been delegated to the executive branch in hundreds of public land laws.

Petitioner complains that members of the President's cabinet threaten to exceed the authority delegated to them by Congress in the following ways:

That the Secretary of Agriculture has no authority to join term and revocable permits for development of Mineral King;

To which the Ninth Circuit unanimously said:

> *"We find little or no likelihood of success in opposing the proposed development upon the ground that there would be an illegal use of term and revocable permits."*

That the Secretary of the Interior has no authority to permit the State of California to improve the existing substandard Mineral King access road to all-weather standards;

To which the Ninth Circuit unanimously said:

> *"We cannot find in the appellee's contentions concerning this proposed road any degree of substantiality."*

That the Secretary of the Interior has no authority to permit construction of a power distribution line across a portion of Sequoia National Park;

To which the Ninth Circuit unanimously said:

"Again, with deference, we fail to find this a substantial issue upon which to base the grant of a preliminary injunction. It seems unlikely that the appellee could prevail as to such a contention."

That the Secretary of Agriculture has no authority to permit the Mineral King recreational development within an area of the national forests designated as a game refuge;

To which the Ninth Circuit unanimously said:

"We find no substance in this argument."

That the Secretary of the Interior may not issue a road construction permit without first holding public hearings;

To which the Ninth Circuit unanimously said:

"The matter of public hearings cannot be considered a substantial factor in this proceeding."

(1) The Secretary of Agriculture Has Authority to Combine Term and Revocable Permits for Recreational Areas Exceeding 80 Acres.

Under the terms of the preliminary permit issued by the Forest Service to the developer in February, 1966, the Forest Service proposes to issue two types of use permits: a thirty-year term permit covering not more than 80 acres of land, and a non-exclusive terminable permit covering further acreage. The terminable permit will actually be an annual permit, terminable at the discretion of the Forest Service. There are 84 ski areas in the United States now operating under such combined permits from the Secretary of Agriculture, and petitioner's assertion if adopted by this Court would invalidate each and every one of those permits.

The authority of the Secretary of Agriculture to grant annual use permits (so-called "terminable" or "revocable" permits) has its genesis in the Act of June 4, 1897, 16 U.S.C. § 551. *McMichael v. United States,* 355 F.2d 283 (9th Cir. 1965). That Act authorized the Secretary to make "rules and regulations" for the "occupancy and use" of the national forests, 16 U.S.C. § 551, and his authority to grant use permits has been confirmed by this Court and by the Attorney General. *United States v. Grimaud,* 220 U.S. 506 (1911); 25 Ops. Att'y Gen. 470 (1905). The Multiple-Use Sustained-Yield Act of 1960 codified existing practice by adding outdoor recreation as an appropriate use of Forest Service land. It stated the policy of Congress "that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes." 16 U.S.C. § 528.

The authority for term permits to use and occupy up to eighty acres for periods not exceeding thirty years is derived from the Act of March 4, 1915, as amended in 1956. 16 U.S.C. § 497. Prior to 1956 term permits for hotel and resort use were limited by the 1915 Act to five acres of land and a duration of thirty years. Amendments increasing the acreage and term, as well as the purposes for which term permits could be granted, were sought by the Department of Agriculture, and finally obtained in 1956, in order to make financing more readily available for recreational improvements on national forests. The 1956 legislation was enabling legislation intended to broaden the authority of the Secretary of Agriculture, not, as petitioner asserts, restrictive legislation intended to limit the Secretary's authority to encourage public recreation on the national forests.

The House Agriculture Committee report on the 1956 amendments reflected an awareness of existing administra-

tive practices and a desire not to disturb the Secretary's basic authority under the 1897 Act to regulate the use and occupancy of the public lands. It said:

> The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the Act of June 4, 1897 (16 U.S.C. 551). Its authority to issue term permits, . . . would be broadened by S. 2216. . . ." H.R. Rep. No. 2792, 84th Cong., 2d Sess. (1956).

And in its report on the Multiple-Use Sustained-Yield Act of 1960, the House Agriculture Committee endorsed the established practices of the Forest Service in granting use permits for private investment in public facilities on forest lands:

> The enumeration of the resources in the bill is by broad categories. They include all of the various segments that go to make up the broad categories. The enumeration of these five broad categories is by resource rather than by uses, but is not to be construed as indicating that any recognized or authorized use of the national forests is to be prohibited and not to be continued. Outdoor recreational use, for example, may include . . . the issuing of both public and private special use and occupancy permits, such as has been the policy with respect to the national forests in the past. H.R. Rep. No. 1551, 86th Cong., 2d Sess. (1960).

The well established practice of the Forest Service of joining thirty-year term permits with revocable permits for winter sports areas is proper. The Ninth Circuit recognized that the 1956 legislation, enacted to stimulate private investment in public recreational facilities on the national forests, must not be twisted into a devise to block the Mineral King recreational area and to close dozens of other ski areas in Western United States.

(ii) The Secretary of the Interior Has Authority to Permit the State of California to Improve the Mineral King Access Road.

Petitioner erroneously contends that the Secretary of the Interior lacks the statutory authority to grant a permit to the State of California for the improvement to all-weather standards of the existing sub-standard county road crossing a six-mile wide portion of Sequoia National Park.

The authority of the Secretary of the Interior to grant a road permit to the State of California is inherent in the delegation by Congress to the Secretary of the power to "regulate the use of the Federal areas known as national parks" in the Act of August 25, 1916, 16 U.S.C. § 1. For decades the Secretary of the Interior has exercised this land management power by permitting the construction of roads traversing national parks.

In addition to the inherent power of the Secretary, the Act of April 9, 1924, 16 U.S.C. § 8 provides that:

> The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior.

(iii) The Secretary of the Interior Has Authority to Permit the Construction of a Power Distribution Line to Serve Mineral King.

Petitioner contends that the 1926 legislation expanding Sequoia National Park prohibits the Secretary of the Interior from granting any right-of-way for distribution lines through Sequoia National Park without first obtaining Congressional approval. Act of July 3, 1926, 16 U.S.C. § 45c (1960). The interpretation placed on Section 45c by the petitioner is untenable when the language is read in context.

Section 45c means that the Federal Power Commission cannot license construction of hydroelectric power genera-

tion facilities and associated primary transmission lines *within* the limits of Sequoia National Park without Congressional consent. There is specific authority in the Act of February 15, 1901, 16 U.S.C. § 79, for the Secretary of the Interior to grant revocable rights-of-way "through" Sequoia National Park "for electrical plants, poles, and lines for the generation and distribution of electrical power and for telephone and telegraph purposes." Ten years thereafter, in 1911, Congress delegated to the head of a department having jurisdiction over lands the authority to grant *term* rights-of-way "for electrical poles and lines . . . over, across and upon public lands." Act of March 4, 1911, 16 U.S.C. § 5.

In 1921 Congress restricted the licensing authority of the newly created Federal Power Commission to prevent inundation of high mountain canyons in national parks and monuments:

> . . . [N]o permit, license, lease or authorization for dams, conduits, reservoirs, powerhouses, transmission lines or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as constituted March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress. Act of March 3, 1921, 16 U.S.C. § 797a.

This section is a limitation only on the licensing power of the Federal Power Commission, not on the power of the Secretary of the Interior to grant rights-of-way and permits for power distribution lines under the 1901 and 1911 Acts. 16 U.S.C. §§ 5, 79.

Sequoia National Park was expanded in 1926, in part because of public concern that certain Sierra valleys might be inundated by reservoirs for hydroelectric power generation. The proscriptive language of the 1921 Act was copied

verbatim into the 1926 Act to *"prohibit the development of hydroelectric power* in the . . . enlarged park," (Emphasis added)[2] and was codified as the proviso in 16 U.S.C. § 45c. Thus, Sequoia National Park was insulated from the threat of Federal Power Commission licensing of dams and power plants within its boundaries.

Prohibition of licensing of hydroelectric power projects within Sequoia National Park was the sole purpose of Section 45c.[3] It was not intended to repeal the authority of the Secretary of the Interior to grant rights-of-way for distribution lines under the 1901 and 1911 Acts.

(iv) The Secretary of Agriculture Has Authority to Permit Outdoor Recreation in Sequoia National Game Refuge.

The 1926 Act expanding Sequoia National Park excluded Mineral King from the park, leaving it under Forest Service dominion. However, it established the Sequoia National Game Refuge to prohibit all hunting and trapping at Mineral King, except under regulations of the Secretary of Agriculture. Act of July 3, 1926, 16 U.S.C. § 688. The Sierra Club contends that the issuance of a permit for development of a recreational area violates this restriction on hunting and trapping.

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2. H.R. Rep. No. 583, 67th Cong., 2d Sess. 2 (1922) (to accompany H.R. 7452). "The city of Los Angeles has on file with the Federal Power Commission applications for six power sites within this proposed new area. The San Joaquin Light & Power Corporation has applied for two sites." Id. at 3. See also Hearings Before the House Committee on the Public Lands on H.R. 4095, 68th Cong., 1st Sess. 19, 39 (1924).

3. The language of Section 45c has been applied once, and then for the purpose for which it was intended. In 1963, in connection with Federal Power Commission re-licensing of its Kaweah No. 3 Project, the Southern California Edison Company was required to obtain legislation specifically authorizing the Secretary of the Interior to issue a permit for the continued operation, maintenance and use of hydroelectric facilities within Sequoia National Park. Pub. L. No. 88-47, 77 Stat. 70 (June 21, 1963).

The refuge legislation allows the Secretary of Agriculture to "permit other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which the game refuge is established." 16 U.S.C. § 688. Under that statutory directive, the Secretary of Agriculture, in the exercise of his discretion, has continued multiple-use management of the land. The Secretary has authorized game hunting at Mineral King to prevent range and property damage caused by the existing overpopulation of deer and bear. He now proposes to authorize a recreational development. A federal court should not "second-guess" the Secretary of Agriculture on wildlife and land management decisions which have been committed to his discretion by Congress.

(v) There Is No Requirement of a Public Hearing by an Agency of the Federal Government in Connection with the Location and Design of the Mineral King Road.

There is no merit to petitioner's contention that public hearings were required to be held regarding the location and design of the Mineral King access road. No statute or departmental regulation requires such hearings.

The last-minute policy statement of Secretary Udall, adopted without hearings only two days before he left office in January, 1969, was immediately and validly revoked by Secretary Hickel. Petitioner's suggestion that this revocation was itself ineffective because of a failure to hold hearings on the question of revocation is refuted by the statute upon which petitioner relies. Section 553 of the Administrative Procedure Act explicitly exempts from its notice and hearing requirements all "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b).

Thus, both the adoption of the road hearing procedures on January 18, 1969, and their revocation on April 21, 1969, were exempt from the notice and hearing requirements of the Administrative Procedure Act.

In the absence of a departmental regulation, there is no obligation that a hearing precede administrative decisions regarding road locations. No statute specifically governing the Interior or Agriculture Departments contains such a provision. The Administrative Procedure Act, by its terms, does not apply to such forest management decisions. 5 U.S.C. § 553(a)(2). See *Duesing v. Udall*, 350 F.2d 748, 752 (D.C. Cir. 1965), cert. den. 383 U.S. 912; *McNeil v. Seaton*, 281 F.2d 931 (D.C. Cir. 1960); Reich, *The Public and the Nation's Forests*, 51 Calif. L. Rev. 381, 394-395 (1962).

In those few instances in which Congress has desired administrative hearings in connection with public land management decisions, it has specifically so provided in the relevant statute. *See, e.g.*, Classification and Multiple Use Act, 43 U.S.C. § 1411(a); Wilderness Act, 16 U.S.C. § 1132(d)(B).

II

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE SIERRA CLUB LACKS STANDING TO MAINTAIN THIS ACTION.

A. The Ninth Circuit Decision That the Sierra Club Lacks Standing Is in Harmony with Recent Decisions of this Court.

Petitioner contends that the Ninth Circuit's decision on standing conflicts with the controlling decisions of this Court and with recent decisions in other circuits. In arguing that the Ninth Circuit decision conflicts with decisions of this Court, petitioner refers to *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150 (1970),

and *Barlow v. Collins,* 397 U.S. 159 (1970). No conflict exists.

Data Processing holds that a plaintiff must meet two necessary conditions to have "standing to sue." First, the action which the plantiff challenges must have caused or threatened "injury in fact." Second, this injury must be to an interest of the plaintiff which is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." The plaintiffs in *Data Processing,* and in the companion case of *Barlow v. Collins,* satisfied both conditions; the petitioner in the instant case does not.

Plaintiffs in *Data Processing* were computer service organizations whose competitive position was directly threatened by administrative approval of the penetration of their market by national banking corporations. The Court held that plaintiffs had standing because one of the purposes of the relevant statute, the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864, was to protect the economic interest of potential competitors by restricting banks from expanding into new markets. In *Barlow v. Collins,* plaintiffs were tenant farmers challenging regulations of the Secretary of Agriculture which would have increased the farmers' economic dependence on their landlords. Here again, plaintiffs were held to have standing since the injury was palpable and the statute, the Food and Agriculture Act of 1965, 7 U.S.C. (Supp. IV) § 1666(d), expressly directed the Secretary to protect the tenants' interests.

The case at bench is significantly different, as the Ninth Circuit apprehended. The Sierra Club is a corporation formed to promote its members' interests in conservation and outdoor recreation. Although the complaint alleged that these interests would be "vitally affected" by the various actions of the defendant administrators, it is apparent that any injury is substantially more diffuse and problematic

than in either *Data Processing* or *Barlow*. Petitioner is no more injured by the proposed Mineral King recreational area than it is by any other federal land or natural resource management decision with which it may happen to disagree.

More significantly, the statutes involved in this case were not enacted to codify the preference of some individuals for a policy of minimal recreational enjoyment of federal land. It is obvious that petitioner opposes use of any land at Mineral King for skiing or other winter sports. Since there are no applicable statutes which embody this particularized philosophy of recreation, and thus no interests of the petitioner which are arguably within the relevant "zones of interests", denial of standing was entirely consistent with the principles announced in *Data Processing*.[4]

B. The Ninth Circuit's Decision That the Sierra Club Lacks Standing Does Not Significantly Conflict with the Decisions of Other Circuits.

Petitioner asserts that the opinion of the Ninth Circuit conflicts with recent decisions of the Second Circuit and the District of Columbia Circuit, specifically: *Environmental Defense Fund Incorporated v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Citizens Committee for Hudson*

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4. There is no merit to petitioner's suggestion that the Ninth Circuit disregarded *Data Processing's* teaching that the plaintiff's interest need not be merely economic. This was explicitly acknowledged by the court below (Petition App. A. at 16) which held, nevertheless, that Petitioner lacked standing. *Data Processing* does *not* hold that anyone with an interest in aesthetics or conservation has, *therefore,* standing to challenge all administrative actions which distress him and which have an aesthetic impact. This Court held only that the interest sought to be protected by the complainant "at times may reflect 'aesthetic, conservational and recreational' as well as economic values." (397 U.S. at p. 153). The obvious corollary of this principle is that *at other times* such an interest will not be sufficient, depending upon the provisions of the governing statute. As already noted, the statutes governing the defendants' conduct were not enacted to protect the Sierra Club's corporate aesthetics or philosophy.

Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); and *Scanwell Laboratories, Inc. v. Schaffer*, 424 F.2d 859 (D.C. Cir. 1970).

In each of these cases the Court held that the plaintiffs had standing to challenge administrative decisions as representatives of the public interest or "private attorneys general." See *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943) vacated on suggestion of mootness, 320 U.S. 707. The Court below rejected this theory as a basis for standing, holding that it is limited to cases in which a statute authorizes non-official persons to bring an action to prevent unauthorized official action. Petition, App. A, p. 17, n9. Since such a statute did exist in *Environmental Defense Fund Incorporated v. Hardin, supra,* the opinion below is consistent with that case.

Furthermore, this Court has already resolved the issue, indicating that the position of the Ninth Circuit is correct (*Association of Data Processing Service Organization, Inc. v. Camp, supra,* 397 U.S. 150, 154, n. 1).

The conflict, if any, between the decision of the Ninth Circuit in this case and decisions of the Second Circuit and D.C. Circuit are not of such consequence to constitute "special and important reasons" for granting certiorari in this case. The conflict is more in articulation of a general rule of standing than in the result which would be reached by different courts in a particular case. To the extent that a broad grant of standing to "public interest" litigants may be found in Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702, an element of judicial discretion has also been introduced to prevent nuisance litigation such as this. In *Scanwell Laboratories, Inc. v. Schaffer, supra,* the D. C. Circuit said:

> Of course it is true that the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits

> will be averted. There must be a practical separation of the meritorious sheep from the capricious goats....

This case, in which the Ninth Circuit has unanimously held there is little or no possibility the Sierra Club could prevail on the merits, is the "capricious goat" referred to by the D.C. Circuit. Whatever difference there may be in articulation of reasons for its decision the result achieved by both courts would be the same; this case should be dismissed.

CONCLUSION

For the foregoing reasons your Amicus Curiae, the County of Tulare, respectfully requests that the Petition for Certiorari be denied.

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